IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2006 Session

OTIS BROWN, JR., ET AL. v. WILLIAM SCHIERHOLZ, ET AL.

Appeal from the Circuit Court for Williamson County
No. 03382 Russ Heldman, Judge

No. M2005-02031-COA-R3-CV - Filed on February 9, 2006

This appeal arises from the alleged agent's ("agent") suit to enforce an agreement entered into on behalf of the alleged principal ("principal"). The principal responded that the agent did not have the authority to enter into the agreement, and thereby refused to compensate the agent. The trial court ruled that the agent did not have the requisite authority to bind the principal, and awarded damages to the principal on his counterclaim. However, the trial court did award a commission fee to the agent. The ruling of the trial court regarding the validity of the agreement is reversed and this cause is remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S. and FRANK G. CLEMENT, JR., J., joined.

Jay R. Slobey, Nashville, Tennessee, for the appellants, Otis Brown, Jr. and Brass Lantern Farm, Inc.

J. Timothy Street, E. Covington Johnston, Jr., Franklin, Tennessee, for the appellees, William Schierholz and Lisa Schierholz.

OPINION

I. FACTUAL BACKGROUND

Appellant Otis Brown, Jr. ("Brown") is the president and majority shareholder of Brass Lantern Farm in Brentwood, Tennessee. Brown and Brass Lantern Farm are in the business of buying, selling, boarding, and training horses. Brown trains riders as well. He has been involved

in the horse business for several decades.[1] Appellees (William and Lisa Schierholz) reside in Chesterfield, Missouri. Brown's relationship with the Schierholzes developed several years before the conflict arose, when they hired him to train both their minor daughter and several of their horses. Over the years, Brown served as the Schierholzes' agent in buying, selling, and leasing horses, and trained many of the horses that Appellees owned.

In July of 2002, the parties traveled to a horse show in Asheville, North Carolina. At the show they encountered a horse named Hidden Creek's Cameron ("Cameron"). Believing that the horse could be useful in furthering their daughter's riding career, and with the approval of Brown, the Schierholzes decided to purchase Cameron. The parties orally agreed that Brown would serve as Mr. Schierholz's agent in the purchase of Cameron. Mr. Schierholz left Asheville before the agreement to purchase the horse was entered into. Helen Varble ("Varble") served as the agent for the seller, Wellington Show Stable. The contract in question states in full:

> Agreement between Wellington Show Stable (Agent) and Bill Schierholz (buyer), made today, July 21, 2002, Regarding small, bay, gelding known as Hidden Creek's Cameron.
>
> 1) $10,000 Due within 3 days of completion and approval of Veterinary Exam, and decision to purchase - or horse will be returned to West Palm Beach, Fla. On earliest available transportation at Schierholz expense.
>
> 2) $20,000.00 Additional to be paid 30 days after initial payment.
>
> 3) $6,000.00 Additional to be paid 60 days after initial payment.
>
> 4) 15% Commission ($5400) to be paid to Brass Lantern Farm 90 days after initial payment to owner.
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> 5) $100.00 per day Late Fee due upon any late payment to any above party.
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> 6) Horse will not leave Brass Lantern Farm (Otis Brown, Jr.) care, custody and control at home or at horse shows until horse is paid in full as described above. Furthermore, horse will not leave Brass Lantern Farm until all related payments incurred by this horse are paid in full - ie: blacksmith, veterinarian, board & training, etc.

Below the contents of the agreement, Varble signed on the line designated "Signature, Agent for Seller," and Otis Brown Jr. signed on the line designated "Signature, Agent for Buyer."

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[1] Brown testified that he trained riders for the Olympics on multiple occasions, and has himself been an alternate for the Olympic team on two occasions.

The remaining facts are in dispute. Brown claims that he, Varble, his assistant, and Mrs. Schierholz were present in his trailer at the horse show when the contract was written. In his deposition, Brown stated that the only instructions he received from Mr. Schierholz were to purchase the horse and negotiate a pay schedule so that he would not have to pay the full price immediately. Following the execution of the agreement, Brown claims that he contacted Mr. Schierholz by telephone and explained all the provisions of the agreement to him, at which time Mr. Schierholz ratified such agreement. According to Brown, the discussion between the two included explanations of both the late fee and commission provisions. The agreement included the late fee provision at the request of Varble. At his deposition, Brown testified that Varble requested the late fee because the Schierholzes had bounced checks to Brown in the past. Brown asserts that Mrs. Schierholz was present during the negotiations and execution of the agreement, and made no objections to any of the terms. At trial, he testified that it was Mrs. Schierholz who requested that Brown defer his commission until all the installment payments were made. He further testified that she left before the agreement was signed, and told Brown to "sign it as her agent."

Appellees' account of the facts are much different. They agree that Brown was to act as Mr. Schierholz's agent in the purchase of Cameron. They further agree that Mr. Schierholz wished to purchase Cameron if he could pay for the horse in installment payments. However, the Schierholzes assert that at the time the contract was written, they did not agree to pay Brown a commission or to pay the late fee penalty. The Schierholzes also deny that they ever ratified such provisions in the contract at a later time.

After the purchase of Cameron in North Carolina, the horse resided at Brass Lantern Farm in Tennessee. Per the terms of the contract, Cameron was to stay with Brown at Brass Lantern Farm until he was paid for in full, and his other expenses, such as blacksmith, veterinarian, and stableage, were paid. Brown testified that Cameron was not only boarded, but also trained during his stay at Brass Lantern Farm.[2] In February of 2003, Mrs. Schierholz sent a letter to Brass Lantern Farm requesting that only minimum care be given Cameron; she requested the farm's seven hundred dollar ($700) basic care package. The letter from Mrs. Schierholz states the following:

> Dear Carrie, Brownie, or whomever is taking care of Cameron;
> I already requested minimal care, we must have a misunderstanding. Please do only the following:

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[2] A: We initially kept that horse under what we call our boarding and training rate, which was to try to keep him ready and fit to go to competition.

Q: Why was that?

A: Because that was the purpose to which they bought the horse.

Q: Did they, during that period of time up until January [2003] object to the charges?

A: No, sir.

1) Give grain
2) Give hay
3) turn out
4) pick feet
5) only basic shoeing

Please do Not:

1) Ride
2) Brush
3) Give supplements
4) Lunge
5) Bathe

Thank you
Lisa Schierholz
P.S. I'm going to try to send money every two weeks.
P.S.S. A bill for basic care of $1356.00 is not what I consider basic. We talked about 700.00. It would be fine if you want to send him to be turned out somewhere with the understanding I can't get him until we settle. Three hundred dollars for brushing is way out of my league.

Brown granted Mrs. Schierholz's request, giving Cameron only the most basic of care during the remainder of his stay at Brass Lantern Farm. As a result, Brown testified at trial, Cameron's value diminished in the face of his lack of daily training, and the horse could no longer perform at the desired level. Brown testified that the horse, for which the Schierholzes paid thirty-six thousand dollars ($36,000), diminished in value to fifteen thousand dollars ($15,000):

Q: What's the problem with this with regard to showing an animal, with only the $700 care for this horse?
A: If you don't, on a regular basis, exercise and train horses, they aren't up to snuff to go to the horse show ring and compete...
Q: What happens with regard to the price or the value of the horse when none of this training occurs on a regular basis?
A: It's going to diminish.
Q: Why is that?
A: Because he's not ready to perform at the level to which he is supposed to.
Q: And as we sit here today, do you have an opinion as to the value of this animal?
A: I would say he's probably worth 15,000 as of today.

Following the letter from Mrs. Schierholz, Brown asserts that he has received no further payments from the Schierholzes.

Eventually, the Schierholzes paid Wellington Show Stable for Cameron in full. In her deposition, Varble testified that Wellington Show Stable had some difficulty obtaining timely payments from the Schierholzes, and that one of the installment payment checks in the amount of

ten thousand dollars ($10,000) bounced. After Wellington Show Stable was paid in full, Brown refused to release Cameron to the Schierholzes because he claimed that he had not received payment for his services in the transaction, including fees for blacksmiths, veterinarians, and board and training. In addition to Cameron's upkeep, Brown claimed that he was still owed his commission from Cameron's sale, and the late penalty of one hundred dollars per day on outstanding debt. Further, Brown refused to release Cameron until all of the Schierholzes' debt to Brass Lantern Farm had been paid, including charges wholly unrelated to Cameron (regarding other horses the Schierholzes had boarded and trained at the farm). Such charges were included in invoices sent from Brass Lantern Farm to the Schierholzes when they requested possession of Cameron. When legal proceedings began, Cameron was still in the possession of Brass Lantern Farm. The Schierholzes demanded possession of their horse, and Brown demanded payment of the Schierholzes' outstanding balance.

The final hearing on the matter took place on July 25, 2005. The court found that Mr. Schierholz was "entitled to the diminution in value of the horse while said horse was wrongfully withheld in the amount of Seventeen Thousand and 00/100 ($17,000.00) Dollars," and also determined that Mr. Schierholz was "entitled to recover the rental value for a replacement horse in the amount of Seven Thousand Nine Hundred and 00/100 ($7,900.00) Dollars." The total judgment amount entered against Appellants was Twenty Four Thousand Nine Hundred and 00/100 Dollars ($24,900). However, the court reduced that amount by Five Thousand Four Hundred and 00/100 ($5,400.00) Dollars, or by Appellant Brown's commission fee while acting as agent in the transaction. Brass Lantern Farm was not awarded the stableage charges sought, because the court found that the increased charges were caused by Brown's wrongful possession of the horse. Finally, the court ordered that Cameron be delivered to Mr. Schierholz immediately. Both parties appealed.

Appellants appeal, alleging that the trial court erred in (1) awarding diminution in value of the horse damages to Mr. Schierholz, (2) allowing recovery for rental value of a replacement animal, and (3) failing to find the Schierholzes liable for Cameron's stableage charges. Appellees appeal (1) the trial court's award of a Five Thousand Four Hundred and 00/100 ($5,400.00) Dollar commission fee to Brown, and (2) the trial court's diminution in value award of Seventeen Thousand and 00/100 ($17,000.00) Dollars, alleging that they are entitled to recover the value of Cameron at the time of conversion, plus interest.

II. STANDARD OF REVIEW

The standard of review, stated in Tennessee Rule of Appellate Procedure 13(d), provides that "[u]nless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Rule App. P. 13(d).

We are hampered in implementing this standard of review by the fact that the rulings of the trial court contain no findings of fact. The entire case against William Schierholz was dismissed by order entered May 26, 2005, in which the trial court granted involuntary dismissal at the conclusion

of the plaintiff's proof, holding that "an agency agreement may not be proven by the out-of-court unsworn statement of the agent and that William Schierholz did not ratify the terms of the agreement executed by Otis Brown, Jr. on July 21, 2002, denominated as trial exhibit 6, and that therefore the motion of William Schierholz is well-taken and the case against him is hereby dismissed." In that same order, the trial court dismissed late fees asserted against Lisa Schierholz finding that such $100-per-day late fee "was binding only between Wellington Show Stables and William Schierholz." In the final order of July 28, 2005, the trial court finds only that "Otis Brown, Jr. and Brass Lantern Farms, Inc. wrongfully withheld possession of the horse known as Hidden Creeks Cameron from the rightful owner, William F. Schierholz, III." Based upon this finding, the court awarded to Schierholz diminution in value of the horse "while said horse was wrongfully withheld" in the amount of $17,000 and the rental value of a replacement horse in the amount of $7,900. The trial court then found that Otis Brown, Jr. was entitled to his $5,400 commission "while acting as the agent for William F. Schierholz, III, in negotiating the purchase of said horse." Thereupon the court further held that Brass Lantern Farms, Inc. must look to Brown for payment of stabling charges because of the wrongful possession by Brown and further that Cameron should be delivered immediately to William F. Schierholz, III.

When a trial court does not make findings of fact, "we must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn.1999). This Court has held:

> Without findings of fact, there is nothing in the record upon which the presumption of correctness set forth in Tennessee Rule of Appellate Procedure 13(d) can attach. This Court, therefore, reviews the record *de novo* without a presumption of correctness.

Devorak v. Patterson, 907 S.W.2d 815, 818 (Tenn.Ct.App.1995). In the context of a contested domestic relations action, this Court explained why the absence of findings of fact by the trial court undermines the presumption of correctness.

> In a record containing material evidence adverse to the positions taken by each spouse, we will not make our decision by attempting to discern the reasons for the trial court's decision. Rather, we will proceed to review the record *de novo*. Since the trial court made no findings of fact, there is nothing in this record upon which the presumption of correctness contained in Tennessee Rule of Appellate Procedure 13(d) can attach.

Kelly v. Kelly, 679 S.W.2d 458, 460 (Tenn.Ct.App.1984). *See also Mason v. Metropolitan Gov't of Nashville*, 189 S.W.3d 217, 220 (Tenn.Ct.App.2005); *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn.Ct.App.1995).

III. ANALYSIS

Existence of a Valid Contract

Appellants claim that the contract executed between the parties was valid in every way, entered into for the benefit of the Schierholzes and subsequently agreed to by them. Appellees, the Schierholzes, claim that Brown did not have the authority to enter into the agreement, that it was never ratified by them, and therefore they should not be held responsible under its terms.

The holding of the trial court that the agency agreement is based on out-of-court unsworn statements by the agent Otis Brown, Jr., is contrary to the preponderance of the evidence. Testimony of all parties indicates that Brown and Brass Lantern Farm were in fact the agents of Mr. Schierholz for the purpose of purchasing Cameron.[3] Brown had the authority, as Mr. Schierholz's agent, to enter into the agreement to purchase Cameron. Mr. Schierholz gave Brown one instruction to guide his negotiations, specifically, his wish to make installment payments.

The evidence shows a long-term relationship of principal/agent between Brown and the Schierholzes, dating back to transactions that took place prior to the one in dispute. Brown served as Mr. Schierholz's agent in at least three previous similar transactions. Mr. Schierholz made no

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[3] At trial, Mr. Schierholz testified as follows:

Q: [Brown] was acting as your agent, negotiating the purchase of this horse?

A: Yes, sir.

In her deposition, Mrs. Schierholz testified as follows:

Q: Did you authorize Mr. Brown to go ahead and purchase this horse on your behalf?

A: Me personally?

Q: You and your husband?

A: No.

Q: Who did?

A. My husband.

In his deposition, Mr. Brown testified as follows:

A: On behalf of Mr. Schierholz I just wrote this contract.

Q: You were his agent, weren't you?

A: Absolutely.

indication that any problems arose with the previous transactions. According to the Supreme Court of Tennessee:

> A very general mode of establishing authority on the part of the agent to bind the principal is by proof of recognition by the principal of other similar acts and transactions performed by the agent. *Tennessee Products Corporation v. Broadway National Bank, supra*; 2 Am. Jur., Agency, sec. 449, p. 356; 3 C.J.S., Agency, sec. 328, pp. 307, 308; cf. *Conaway v. New York Life Ins. Co. et al.*, 171 Tenn. 290, 102 S.W. (2d) 66; *Eve v. Union Cent. Life Ins. Co., et al.*, 26 Tenn. App. 1, 167 S.W. (2d) 8. In his excellent treatise on Agency, Mr. Mechem says:
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> > Section 263. By acquiescence in, or recognition of, similar acts. -- So evidence of agency is also often found in the fact that the alleged principal has acquiesced in, recognized or adopted similar acts done on other occasions by the assumed agent (and the considerations will be similar to those dealt with in the preceding section.) Where the acts so adopted are so closely connected as to constitute a course of dealing, or to establish a custom, there can usually be but little difficulty; neither can there be where the acts are so numerous or so closely related as to reasonably lead to no other conclusion than that of a general agency for the doing of acts of that character. 1 Mechem on Agency (2d Ed.), sec. 263, pp. 188, 189.
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> The American Law Institute in the Restatement of Agency expresses a similar view (Vol. 1, sec. 43):
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> > Section 43. Acquiescence by Principal in Agent's Conduct.
> >
> > (1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.
> >
> > (2) Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.
> >
> > Comment:
> >
> > a. Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve. If the agent has been previously authorized and the extent of his authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal, indicates that the parties understood that such acts were authorized, and the rule stated in Section 42 is applicable. If there was clearly no authorization to do the acts, the acquiescence by the principal indicates an affirmance which normally operates as ratification (see Section 94).

Boillin-Harrison Co. v. Lewis & Co., 182 Tenn. 342, 355-357 (Tenn.1945). In order to secure the installment payments that Mr. Schierholz desired, Brown accepted terms that were in favor of the seller. As Mr. Schierholz's agent in the matter, Brown certainly had the authority to negotiate such terms.

Further, Mr. Schierholz manifested his consent to the terms of the agreement. On manifestation of consent, this Court has stated the following:

> When an agreement is reduced to writing but is signed by only one of the parties, it is binding on the non-signing party if that party has manifested consent to its terms. *Southern Motor Car Co. v. Talliaferro*, 14 Tenn. App. 276, 280, 1931 Tenn. App. 36, 1931 WL 1595, at *3 (Tenn. Ct. App. March 5, 1932) (***cert. denied***). What is critical is mutual assent to be bound. In determining mutuality of assent, courts use an objective standard based on the manifestations of the parties. 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 30:6 (4th ed. 1999). Assent can be established by the course of dealing of the parties. *Remco Equip. Sales*, 952 S.W.2d at 439. In determining whether a contract exists, the court also can consider relevant evidence such as whether the parties performed under its terms. 11 Williston & Lord, § 30:3. When a party who has not signed a contract has nonetheless manifested consent by performing under it and making payments conforming to its terms, that party is estopped from denying that the parties had a meeting of the minds sufficient to bind them to the contract. *R.J. Betterton Management Serv., Inc. v. Whittemore*, 769 S.W.2d 214, 216 (Tenn. Ct. App. 1989).

T. R. Mills Contrs., Inc. v. WRH Enters., LLC, 93 S.W.3d 861, 866 (Tenn.Ct.App.2002). Similarly, the Supreme Court of Tennessee stated that "[w]hen a party that has not signed a contract demonstrates its assent by performing pursuant to the contract and making payments conforming to the contract's terms, that party is estopped from denying the binding effect of the contract." *Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 525 (Tenn.2004). Mr. Schierholz manifested his assent to the agreement in two ways. First, he attempted to make payments according to the installment schedule set forth in the agreement. Mr. Schierholz attempted to conform to the terms of the agreement. He certainly took advantage of installment payments; he did not pay for the horse all at one time. Second, Mr. Schierholz paid late fees, according to the late

fee penalty clause, when his first check to Wellington Show Stable for $10,000 bounced.[4] Such behavior indicates Mr. Schierholz's knowledge of and assent to the agreement.

Independent of the above argument, this Court is inclined to declare the contract enforceable between the parties. When the validity of a contract is called into question, courts are hesitant to render the contract invalid. On the issue of validity of contracts, this Court has held that "the destruction of contracts because of uncertainty has never been favored by the law, and with the passage of time, such disfavor has only intensified." *Gurley v. King*, 183 S.W.3d 30, 34 (Tenn.Ct.App.2005). Further, this Court has held that:

> The determination that an agreement is sufficiently definite is favored. Therefore, the courts will, if possible so construe the agreement as to carry into effect the reasonable intention of the parties, if that can be ascertained. The law leans against the destruction of contracts for uncertainty, particularly where one of the parties has performed his part of the contract." 17 Am.Jur.2d Contracts § 75 (1964).

APCO Amusement Co. v. Wilkins Family Rest. Of Am., Inc., 673 S.W.2d 523, 528 (Tenn.Ct.App. 1984); see also *McClain v. Kimbro Constr. Co., Inc.*, 806 S.W.2d 194, 198 (Tenn.Ct.App.1990). In the present case, Appellants Brown and Brass Lantern Farm have performed their parts of the contract by serving as Mr. Schierholz's agent in the transaction and providing stableage for Cameron.

In determining that the preponderance of the evidence establishes that the handwritten one-page contract of July 21, 2002 is in fact the contract binding the parties, the Court notes that the evidence establishes:

1. The consideration for the purchase of the horse was $36,000, payable in three installments, which was in accord with Mr. Schierholz' instructions to Brown about installment payments.
2. Payments to Wellington Show Stable by Mr. Schierholz were subsequently made in installments.

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[4] In her deposition, Varble testified as follows:

Q: Did you eventually get paid for that ten thousand dollars?

A: Yes....

Q: All right. Was this payment late?

A: Yes.

Q: Did you receive a penalty amount on that check or any amount during this transaction?

A: As I remember, I did receive a penalty on it.

3. Mr. Schierholz paid to Wellington Show Stables the $100 per day late payment fee as set forth in the July 21, 2002 contract. Mrs. Schierholz testified that Brass Lantern was entitled to a 15-percent commission as same was set forth in the July 21, 2002 contract.
4. Cameron was in the care and custody of Brass Lantern Farm after July 21, 2002.

Further confirmatory of the agreement is the letter from Lisa Schierholz of February 2003 instructing Brown or "whoever is taking care of Cameron" to limit the care of Cameron to minimal care with the a postscript stating "a bill for basic care of $1,356.00 is not what I consider basic. We talked about $700.00. It would be fine if you want to send him to be turned out somewhere with the understanding I can't get him until we settle."

This letter was forwarded to Brass Lantern three months after the controversial invoice of November 2, 2002, setting forth charges to Schierholz that included expenses not related to Cameron. The provisions of this February 2, 2003, letter are consistent with paragraph 6 of the July 21, 2002, contract relative to the custody and control of Cameron by Brown until "all related payments incurred by this horse are paid in full - i.e. : blacksmith, veterinarian, board & training, etc." and is inconsistent with any other explanation for such custody and control by Brass Lantern.

Once it is determined that the July 21, 2002, agreement is in fact the contract binding all parties, little else can be determined from the record before this Court. As long as the fifteen-percent commission due to Brass Lantern under paragraph 4 of the agreement and payments due Brass Lantern as to Cameron for "blacksmith, veterinarian, board & training, etc." remain unpaid, possession of Cameron by Brass Lantern is not wrongful, but in conformity with the contract of the parties. The $18,000 invoice which included charges other than those related to Cameron pre-dated by three months the letter of Lisa Schierholz of February 2003.

The timetable involved in the July 21, 2002, agreement is calculable to a reasonable certainty from the face of the instrument but cannot be exactly calculated because the actual date of completion and approval of veterinary exam does not appear in the record. Also, the $10,000 check from Schierholz due three days after completion of veterinary exam was returned by the bank for insufficient funds and was not made good by the Schierholzes for an undisclosed number of days after the check was returned by the bank. It would appear that the commission, which was due 90 days after the initial payment to Wellington Show Stables, would have become due some time in early October of 2002. From this point forward, it would appear that all parties disregarded the plain provisions of the contract. The Schierholzes never recognized an obligation to pay the $5,400 commission to Brass Lantern Farm, and Brass Lantern Farm insisted that the entire balance of monies owed by the Schierholzes to Brass Lantern would have to be paid before Cameron would be released to the Schierholzes. According to witnesses for Brass Lantern, this was a "policy" of Brass Lantern Farm. This "policy" runs directly contrary to paragraph 6 of the contract, which limits the right of Brass Lantern Farm to retain custody and control of Cameron to expenses and all related payments "incurred by this horse." The contract between the parties provides no justification for

implementation of this so-called "policy" of Brass Lantern to hold Cameron until accounts between the parties totally unrelated to Cameron are settled.

So it is that on the record before this Court, Brass Lantern is entitled under the contract to its commission and is entitled to hold Cameron until the commission is paid. Brass Lantern has no right, however, to hold Cameron hostage to its demand for payment by the Schierholzes of accrued accounts unrelated to the care of Cameron. Even if one could say that the $100 per day late fee under paragraph 5 of the contract is applicable as to between the Schierholzes and Brass Lantern Farm rather than as found by the trial court applicable only between the Schierholzes and Wellington Show Stables, its applicability in the face of Brass Lantern's unjustified demand relative to accounts unrelated to the care of Cameron is highly suspect.

The object of this contract is a horse and not a motorcycle, which could be conveniently stored with no cost until the parties settled their differences. Somebody, however, has to feed the horse while the litigation progresses, and somebody has to pay for the feeding and upkeep of the horse.

We cannot adequately determine the issues on the record in this case. The judgment of the trial court is reversed insofar as it finds that the agreement of July 21, 2002, is not binding on all parties to this litigation. As there is nothing remaining to be resolved under the contract as it relates to Wellington Show Stable, the case is remanded to the trial court for further proceedings under the contract of July 21, 2002, and the effect of both the Schierholzes and Brass Lantern Farm disregarding the provisions of their contract. Costs on appeal are assessed equally to the parties.

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WILLIAM B. CAIN, JUDGE